SANYAN SDN BHD

v.

SANYAN LUMBER SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CASE NO: KCH-28-36/9-2011]
2 FEBRUARY 2012

COMPANY LAW: *Winding up - Stay of order - Whether advocate had authority to apply on company's behalf for stay pending appeal without resolution of Board of Directors - Whether advocate's application complied with O. 45 r. 11 Rules of the High Court 1980 - Whether applicant had shown occurrence of matters since date of winding-up order - Factors to be considered in contributory's application for stay under s. 243(1) Companies Act 1965 - Whether opposition to stay by petitioner, liquidator, contributories and creditors relevant factors to be considered*

Following the uncontested winding-up of the respondent by order of court ('the order'), two applications were filed to stay the order - one by an advocate ('Clement Wong') who purported to act for the respondent while the other was by a contributory of the company. The advocate's application under O. 45 r. 11 of the Rules of the High Court 1980 sought a stay pending appeal against the order to the Court of Appeal. The application by the contributory - one of two equal shareholders cum directors of the respondent - was made under s. 243(1) of the Companies Act 1965. The common grounds for the two applications were that the debt in the winding-up petition was disputed and not based on a judgment; the petitioner's claim was statute-barred and that the service of the petition on the respondent was bad. The applications were opposed by the petitioner, the respondent's liquidator, the other contributory and director of the company and by a creditor, the Inland Revenue Board ('IRB') which had filed a proof of debt in the liquidation for a substantial sum. The petitioner argued, *inter alia*, that Clement Wong could not represent the respondent as he was only instructed by one of the two contributories/directors and there was no Board of Directors resolution instructing him to file the application on the respondent's behalf. The management of the respondent was deadlocked as the remaining contributory/director was in favour of the winding-up.

Held (dismissing both applications with costs):

(1) Clement Wong had no authority to act for the respondent in the application. There was no resolution from the Board of Directors of the company authorising him to do so. Further, even on the

merits, Clement Wong's application would have failed. To successfully invoke O. 45 r. 11, the application must be premised on matters which had occurred since the date of the order. The only matters that had occurred since the order were the filing of the appeal against the order and the instant applications. These were not matters that would have prevented the court from making the order. The grounds cited in the applications were only relevant to the appeal against the order and had nothing to do with the principles upon which the power conferred by O. 45 r. 11 should be exercised. (paras 12 & 14)

(2) The facts of the case militated against the granting of a stay under s. 243(1) of the Companies Act 1965. The respondent had a huge debt owing to IRB; the balance sheet of the respondent showed there were other trade creditors who were not before the court as they were not served with notice of the application; and the management of the respondent company was deadlocked. (para 25)

(3) All the leading authorities were united in laying down the principle that the attitude of the creditors, contributories and the liquidator was a relevant factor to be considered when deciding a stay application under s. 243(1) of the Companies Act 1965. (paras 21 & 22)

Case(s) referred to:

Delta Drive (M) Sdn Bhd v. Hong Leong Finance Bhd (No. 2) [2000] 4 CLJ 264 HC ***(refd)***

Equiticorp Holdings Ltd v. United Securities Sdn Bhd [2007] 6 CLJ 268 CA ***(refd)***

Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA ***(refd)***

Kotabato Corporation (M) Sdn Bhd & Anor v. Wisma Central Management Corporation [2003] 4 CLJ 520 CA ***(refd)***

Krextile Holdings Pty Ltd v. Widdows [1974] VR 689 ***(refd)***

London Permanent Benefit Building Society v. De Baer [1967] 1 All ER 372 ***(refd)***

Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd [1995] 1 LNS 308 HC ***(refd)***

Re Calgary & Edmonton Land Co Ltd [1975] 1 All ER 1046 ***(refd)***

Re Telescriptor Syndicate Ltd [1903] 2 Ch 174 ***(refd)***

Re Warbler Pty Ltd [1982] 6 ACLR 526 ***(refd)***

Sri Hartamas DVPT Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Syarikat Letrik Sabalan Sdn Bhd v. Sazone Contractor Sdn Bhd [1996] 1 LNS 282 HC ***(refd)***

Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor [1995] 3 CLJ 136 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Yew Chye Heng & Anor v. Venice Hill Resort Living Sdn. Bhd; Yap Chi Kong & Anor (Intervener) [2007] 1 LNS 620 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 131B, 243(1), 253(2)
Companies (Winding-Up) Rules 1972, r. 32
Rules of the High Court 1980, O. 45 r. 11

For the petitioner - Sim Hui Chuang (William Yeo, Lim Lip Tze with him); M/s JM Lim & Co Advocates
For the respondent - Clement Wong (Wong King Wei with him); M/s King Wei & Clement Advocates & Solicitors
For the contributory Drahman Omar - Bong Siak Peng; M/s Bong Siak Peng Advocates
For the contributory Ting Check Sii - Wong Ho Leng (Ting Cheng Chin with him); M/s Wong Ho Leng & Co Advocates
Liquidator in person - Wan Idris
For the creditor - Wan Khairuddin Wan Montil, Inland Revenue Board

Reported by Ashok Kumar

JUDGMENT

Ravinthran Paramaguru JC:

[1] There are two applications before me. The applications relate to a winding-up order that this court made against the respondent company on 11 October 2011. The first application is for stay of execution under O. 45 r. 11 of the Rules of the High Court 1980 by an advocate purporting to act on behalf of the respondent company. The second application is under s. 243(1) of the Companies Act 1965. This application is made by Dato Ting Check Sii as a contributory of the respondent company.

Brief Facts

[2] The respondent company was wound up on 11 October 2011. It was, in a manner of speaking, a "default" winding up order as suggested in these proceedings. This is because no one appeared for the respondent to oppose the winding up petition. There was no affidavit opposing the petition either. The senior assistant registrar had certified that r. 32 of the Companies (Winding-Up) Rules 1972 was duly complied with. The representative of the official receiver confirmed that the papers were in order. In the premises, I granted the petition as prayed. On 14 November 2011, Mr Clement Wong, an advocate, purporting to act for the respondent, applied *vide* summons in chambers for:

(a) a stay of execution of the winding up order until the final disposal of the respondent's appeal against the winding up order to the Court of Appeal;

A (b) an interim stay of execution of the winding up order until final disposal of the said summons in chambers before this court.

[3] The three main grounds stated in the application are:

(1) The winding up petition is not based upon a judgment of the
B court.

(2) The petitioner's claim in the s. 218 notice is time-barred.

(3) The service of the winding up petition on the respondent was bad and there is *mala fide* on the part of the petitioner.

C **[4]** The second application was filed by Dato Ting Check Sii who is a contributory of the respondent. He is a 50% shareholder of the respondent. This application was made under s. 243(1) of the Companies Act 1965 for a stay of the winding up order. The principal grounds are:

D

(1) The winding up petition is based upon a judgment of the court.

(2) The petitioner's claim in the section 218 notice is time barred.

(3) The service of the winding up petition on the respondent was
E bad and there is *mala fide* on the part of the petitioner.

(4) There are special circumstances that warrant the stay of execution of the winding up order.

[5] On 15 November 2012, I granted an *ad interim* stay of the
F winding up order pending the disposal of the instant two applications as the parties intimated that they would be filing further affidavits.

Issues

[6] In my opinion, after having considered the submissions and the
G affidavits of the parties, the issues that arise in the two applications are as follows;

(1) Whether Mr Clement Wong who has been instructed by only one of the two directors can purport to act for the entire board of directors or for the respondent company?

H

(2) Whether a stay of execution pending appeal against a winding up order can be granted under O. 45 r. 11 or inherent jurisdiction of the court?

I (3) Whether a s. 243(1) stay of proceedings ought to be granted in this case?

Decision

[7] For ease of reference I set out below the parties that appeared before me and their respective stands regarding the two applications:

(a) Counsel for the petitioner;

(b) Liquidator in person;

(c) Mr Clement Wong who purported to act for the respondent.

(d) Counsel for Dato Ting Check Sii who is one of the contributories.

(e) Counsel for Encik Draman @ Morshidi bin Omar who is the other contributory.

(f) Counsel for Inland Revenue Board (IRB) who is a creditor.

[8] The petitioner, the liquidator, counsel for Encik Draman @ Morshidi bin Omar, and counsel for the IRB have all opposed the two applications. Mr Clement Wong and counsel for Dato Ting Check Sii have urged the court that this is a proper case for the grant of a stay of the winding-up order. I note that the applicants have not applied to set aside or rescind the winding-up order. This is entirely proper as the Companies Act 1965 or the Winding-up Rules 1972 does not contain any express provision enabling the High Court to set aside or rescind a winding-up order after it had been perfected (see *Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd* [2005] 5 CLJ 392) HC. However, s. 253(2) of the Companies Act 1965 permits the respondent company to appeal the winding-up order. In addition, s. 243(1) empowers the court to stay a winding-up order altogether or for a limited time. I shall first consider the application for stay of the winding up order pending appeal to the Court of Appeal.

[9] Mr Clement Wong, who is an advocate, has applied on behalf of the respondent company for a stay of execution of the winding up order. Counsel for petitioner submitted in his oral argument during the interim stay application that once a company had been wound up, only the liquidator may represent the company. If this argument is correct, only the liquidator could prefer an appeal against a winding up order and not the board of directors. In *Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC, Hashim Yeop A Sani CJ said as follows:

> *Re Diamond Fuel Company* [1879] 13 Ch D 400 is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.

> After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case, it is expressly provided in s. 253(2) of the Act. The only question is who should move the appeal on behalf of the company.

[10] The above case was followed by *Equiticorp Holdings Ltd v. United Securities Sdn Bhd* [2007] 6 CLJ 268 CA where Gopal Sri Ram JCA said as follows:

> The first issue raised in support of the appeal is that the respondent lacked standing to apply for a stay. It had been wound up. It had no board of directors. All management powers vested in the provisional liquidator. Accordingly Cheah Theam Kheng had no business in purporting to act as a director and in affirming the affidavit in support of the summons for a stay. This argument must be rejected both on principle and authority. As for principle, the point is simply this. *If the appellant is correct in its argument then no appeal can ever be lodged by a company against which a winding up order is made. Because there is nobody competent to mount the challenge*. The company having been wound up ceases to be able to act save through the liquidator. And if he decides not to appeal then that is the end of that. Nothing further can be done. (emphasis added)

[11] In the premises, it would be wrong to argue that only the liquidator can represent the company after a winding up order is made. As stated in the above authorities, the board of directors possess residual authority to appeal or otherwise challenge the winding-up order. It follows that the board of directors could also apply for a stay of execution pending appeal. However, in the written submission, counsel for petitioner has argued that Mr. Clement Wong cannot act for the board of directors because he has been instructed by only one of the two contributories, namely Dato Ting Check Sii who is a 50% shareholder. The other 50% shareholder is Encik Draman @ Morshidi bin Omar who has opposed the applications for stay of the winding up order. Dato Ting Check Sii has claimed to be a manager and director of the respondent. However, that does not mean that he is acting for the board of directors (see *Kotabato Corporation (M) Sdn Bhd & Anor v. Wisma Central Management Corporation* [2003] 4 CLJ 520 CA. There is no resolution from the board of directors of the respondent company authorizing Mr Clement Wong to make the application in question. As submitted by counsel for petitioner, the directors of a company act collectively and not individually unless there is an express delegation or authorisation. Section 131B of the Companies Act 1965 which provides for the powers of a company's directors refers to directors collectively as the board of directors and not individually. The authorities cited

above also refer to the residual power of the board of directors and not to the power of any individual director. In the instant case, there are only two directors. The other director is Encik Draman @ Morshidi bin Omar. He has affirmed an affidavit to state that the board of directors had never appointed Mr Clement Wong to act for the respondent. This averment was not rebutted. In the premises, it must be held that Mr Clement Wong has no authority to act for the respondent company in this application. On this ground alone, the application must be dismissed.

[12] I am also of the opinion that the application could not have succeeded on the merits. O. 45 r. 11 reads as follows:

> **Matters occurring after judgment: Stay of execution, etc. (O. 45 r. 11)**
>
> Without prejudice to Order 27, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

[13] In *London Permanent Benefit Building Society v. De Baer* [1967] 1 All ER 372 (cited in *Syarikat Letrik Sabalan Sdn Bhd v. Sazone Contractor Sdn Bhd* [1996] 1 LNS 282 HC), Plowman J considered the circumstances in which a similar rule could be successfully invoked and stated as follows:

> The power conferred by that rule to grant relief is a power to do so, and I quote, *"on the ground of matters which have occurred since the date of the judgment or order"*. It is, in my judgment, implicit in the rule that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order. (emphasis supplied)

[14] In order to successfully invoke O. 45 r. 11, Mr Clement Wong should satisfy the court that the matters that have occurred since the date of the winding-up order fell within its ambit. However, it is apparent that the matters that occurred since the date of the winding up order are only the appeal against the said winding up order and the instant applications. Quite obviously these are not matters that would have prevented the court from making the winding up order. The grounds cited in the applications are relevant to the appeal against the decision of this court to wind-up the respondent and have nothing to do with the principles upon which the power conferred by O. 45 r. 11 should be exercised. I shall, therefore, dismiss the application by

Mr Clement Wong and order him to pay costs of RM5,000 to the petitioner. I make the said costs order as the application was made by Mr Clement Wong himself and he failed to convince the court that he was authorised by the respondent.

[15] The second application is grounded on s. 243(1) of the Companies Act 1965 which reads as follows:

> **243. Power to stay winding up.**
>
> (1) At any time after an order for winding up has been made the court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit.

[16] Since the first application is for a stay pending the outcome of the appeal to the Court of Appeal against the winding up order, I must at the outset remind myself that a s. 243(1) application to stay a winding up order is not similar to a stay pending appeal. A s. 243(1) stay of proceedings is designed to perpetually stay all proceedings under a winding up for the purpose of resuscitating the subject company (see *Equiticorp Holdings Ltd v United Securities Sdn Bhd (supra)*).

[17] The principles applicable to a stay of a winding up under s. 243(1) order has been expounded in a few cases, notably by the Federal Court in *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevi Nadchatiram & Ors* [1995] 3 CLJ 493 and by the High Court in *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* [1995] 3 CLJ 136. In *Vijayalakshmi*'s case, the Federal Court considered the leading cases of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, *Krextile Holdings Pty Ltd v. Widdow*s [1974] VR 689 and *Re Calgary & Edmonton Land Co Ltd* [1975] 1 All ER 1046 on the subject of stay of a winding up order and distilled the principles from the said authorities and re-stated them as follows:

> (1) The granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
>
> (2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.
>
> (3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.

(4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation. A

[18] In *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor (supra)*, Ariffin J quoted with approval the following principles which were cited in *Re Warbler Pty Ltd* [1982] 6 ACLR 526: B

(a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co Ltd (In Liquidation)*.

(b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this *(Re South Barrule State Quarry Co* [1969] LR 8 Eq 688*, Re Bank of Queensland Ltd* [1870] 2 QSCR 113 referred to). C

(c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. *(Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689 at p 694; *Re Dalta Homes Pty Ltd* [1972] 2 NSWLR 22 at p 26 referred to). D

(d) The attitude of creditors, contributories and the liquidator is a relevant consideration. *(Re Calgary and Edmonton Land Co Ltd (In Liquidation)* referred to). E

(e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. *(Re A Private Company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at p 598 referred to). F

(f) If there has been non-compliance by the directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should be given. *(Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174 referred to). G

(g) The general background and circumstances which led to the winding-up order should be explained. *(Krextile Holdings Pty Ltd v. Widdows* referred to).

(h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to 'commercial morality' or the 'public interest'. *(Krextile Holdings Pty Ltd v. Widdows, Re Dalta Homes Pty* referred to). H

[19] Counsel for Dato Ting Check Sii submitted that the winding-up petition was a "non-starter" in the first place for the reason that: I

(a) the debt was a disputed debt;

A (b) the petition was not served on the respondent; and

(c) there was no mandate to commence the petition.

[20] Dato Ting Check Sii also deposed in his affidavit that the winding-up petition was *mala fide* as it was intended to defeat the appeal of the
B respondent company against Sanyan Wood Industries Sdn Bhd in Civil Appeal No. Q-02-837-2008. The claim of Sanyan Wood Industries Sdn Bhd for arrears of rental from the respondent company had been dismissed by the Sibu High Court. Datuk Haji Mohd Tufail bin Mahmud together with Dato Ting Check Sii and two others comprise
C the board of directors of Sanyan Wood Industries Sdn Bhd. Dato Ting Check Sii alleged in his affidavit that Encik Draman @ Morshidi bin Omar is the nominee of Datuk Haji Mohd Tufail bin Mahmud in the respondent company. He further alleged that the petitioner wound up the respondent with the aim of defeating the appeal of the respondent against
D Sanyan Wood Industries Sdn Bhd. However, I note that after I had granted the interim stay on 15 November 2011, the respondent did not proceed with the appeal before the Court of Appeal. Be that as it may, the argument that the winding up order was wrongly made should be addressed to the Court of Appeal as the appeal is pending before it.
E Insofar as a s. 243(1) application is concerned, the onus is on Dato Ting Check Sii to make out "a positive case for a stay". Counsel for Dato Ting Check Sii submitted that the principles laid down in *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor (supra)* were not followed in other Malaysian cases. As pointed out by counsel for
F petitioner, this is not entirely correct as *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* was followed in *Delta Drive (M) Sdn Bhd v. Hong Leong Finance Bhd (No. 2)* [2000] 4 CLJ 264 and *Yew Chye Heng & Anor v. Venice Hill Resort Living Sdn Bhd; Yap Chi Keong & Anor (Intervener)* [2007] 1 LNS 620 HC with approval. At any rate, both *Vijayalakshmi Devi Nadchatiram v. Mahadevi Nadchatiram & Ors (supra)* which is a
G Federal Court decision and *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor (supra)* both relied on the leading cases of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, *Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689 and *Re Calgary & Edmonton Land Co Ltd* [1975] 1 All ER 1046.

H **[21]** In my opinion, even if some of the principles enumerated in *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor (supra)*, ie, whether all the debts had been discharged fully and whether all the creditors were served with notice of the application, are not hard and fast rules in a s. 243(1) application, on the facts of this case, the court ought not exercise its discretion to order a stay. My reason is as follows.

I

[22] All the leading authorities are united in laying down the principle that the attitude of the creditors, contributories and the liquidator is a relevant consideration. In the instant case, there is at least one creditor, namely the IRB and one contributory who holds 50% of the shares of

the respondent company who have refused consent to a stay of the winding up order. In *Re Calgary and Edmonton Land Co Ltd (In Liquidation)* [1975] 1 All ER 1046 which was relied on in *Vijayalakshmi Devi Nadchatiram v. Mahadevi Nadchatiram & Ors (supra)* and *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor (supra)*, the court held that:

> ... the court would in normal circumstances, generally exercise its discretion to grant a stay only where the applicant showed:
>
> (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or **that he consented to the stay or was otherwise bound not to object to it**;
>
> (b) that the liquidator's position was fully safeguarded, either by paying him the proper amount of his expenses or sufficiently securing payment; and
>
> (c) **that each member either consented to the stay, or was otherwise bound not to object to it**, or there was secured to him the right to reserve all that he would have received if the winding up had proceeded to its conclusion. (emphasis supplied).

[23] In the instant case, Dato Ting Check Sii has not disputed that IRB is a creditor. IRB had filed an action against the respondent for the sum of RM394,195.30 being outstanding income tax due for the years of assessment 2002 and 2003. After the winding-up order was made, IRB filed proof of debt amounting to RM1,261,499.18 which includes the tax due for the years of assessment 2004, 2005 and 2007. Counsel for IRB submitted without being contradicted that no appeal was lodged within the stipulated time-frame with the special commissioners of Income Tax against the assessment of tax which is the subject matter of the civil suit. Dato Ting Check Sii also did not deny in his affidavit that the tax of RM394,195.30 had not been paid to the IRB as yet. He alleged that the tax was not paid because he could not get the co-operation of the other signatory to the cheque book, ie, Datuk Haji Mohd Tufail bin Mahmud. Dato Ting Check Sii said that the old cheque book had expired and Datuk Haji Mohd Tufail bin Mahmud refused to sign the letter to request for a new cheque book. In respect of the proof of debt sum of RM1,261,499.18, Dato Ting Check Sii deposed that the respondent had RM835,180 in the bank and with rental collections, the amount is close to RM1 million. He also said that the unencumbered properties of the respondent could be used to raise further funds to pay the IRB. However, the fact remains that the two directors who are also the equal owners of the company, ie, Dato Ting Check Sii and Draman @ Morshidi bin Omar are locked in stalemate. The inability of Dato Ting Check Sii to issue cheques to pay the IRB is ample testimony of the deadlocked situation of the respondent

company. Therefore, whatever scheme Dato Ting Check Sii may have in mind to pay off the respondent's debts to IRB, it is a certainty that they will not be implemented anytime soon. Therefore, it can be said that the respondent company is insolvent as it cannot pay its debts as they fall due. Furthermore, the IRB has not consented to the stay of the winding up order as it has withdrawn its suit and filed its proof of debt. The consent of IRB is a relevant factor as it has not been paid and no satisfactory provision for payment has been made (see *Re Calgary and Edmonton Land Co Ltd (In Liquidation) (supra)*). The proposed scheme of Dato Ting Check Sii to raise funds cannot be considered "satisfactory provision for payment" as it may not see the light of day due to the standoff between the two equal shareholders of the respondent company. The other contributory, Draman @ Morshidi bin Omar who holds 50% of the shares of the respondent company has also objected to the s. 243(1) stay application. Draman @ Morshidi bin Omar has also affirmed an affidavit to state that the respondent company is insolvent and that there is a deadlock in the management of the company which had affected the operations of the company and payment to creditors. It may well be that the respondent company could realize some assets and raise funds as suggested by Dato Ting Check Sii but the test of commercial insolvency is not whether the assets of a company exceeds its liabilities. As stated by Abdul Malik Ishak JCA in *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775 CA:

> The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as "unable to pay its debts" even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities.

[24] The balance sheet attached to the affidavit of Dato Ting Check Sii affirmed on 7 December 2011, apart from the balance sheet exhibited in the affidavit of the liquidator, also shows that the respondent has other trade creditors apart from the income tax debt due to IRB.

[25] In summary, this is not a case where the court should exercise its discretion to stay the winding-up order that had already been granted. The respondent company had not paid a huge income tax debt owing to the IRB for a number of years. The IRB had withdrawn the suit and filed a proof of debt. They have opposed the stay application. The other contributory to the respondent company, Encik Draman @ Morshidi bin Omar has also opposed the stay application. Due to the equal shareholding of Dato Ting Check Sii and Encik Draman @ Morshidi bin Omar, it is obvious that the respondent company's management is deadlocked. The Balance Sheet exhibited by Dato Ting

Check Sii himself shows that there are other trade creditors who have not been paid. They are not before the court either as they were not served with the notice of this application. After considering the principles set out in *Vijayalakshmi Devi Nadchatiram v. Mahadevi Nadchatiram & Ors (supra)* and *Ting Yuk Kiong v. Mawar Biru Sdn Bhd (Harry Lee Yew Tong, Applicant) (supra)*, I am of the opinion that the facts of this case militate against the granting of a stay application under s. 243(1) of the Companies Act 1965. I shall, therefore, dismiss the application with costs of RM8,000.

Conclusion

[26] In conclusion, both applications are dismissed with costs of RM5,000 and RM8,000 respectively. The *ad interim* order to stay the winding up of the respondent company is hereby revoked.